

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

QUINN AARON KLEIN,)
)
Petitioner,)
)
-vs-) Case No. CIV-09-312-F
)
JUSTIN JONES, DIRECTOR,)
)
Respondent.)

ORDER

Before the court are the Report and Recommendation of United States Magistrate Judge Bana Roberts entered May 10, 2010 (doc. no. 29) and petitioner's Response to Report and Recommendation filed June 2, 2010 (doc. no. 33) which the court treats as an objection to the Report and Recommendation. Pursuant to 28 U.S.C. § 636(b)(1)(B), the court reviews the Report and Recommendation *de novo* in light of petitioner's objection.

Petitioner objects to the Report and Recommendation on the following grounds: 1) petitioner was denied due process when he was denied transcripts by the Cleveland County District Court; 2) the state courts failed to apply the "mailbox rule;" 3) the magistrate judge erred in construing the petition which was filed pursuant to 28 U.S.C. § 2254 as a petition filed under 28 U.S.C. § 2241; 3) petitioner's sentence revocation was illegal and invalid because revocation did not occur until his suspended sentence had run; 4) the Cleveland County District Court could have issued a writ and revoked petitioner's sentence before it expired; 5) the assistant district attorney perjured himself; 6) petitioner complied with rules of the Oklahoma Court of Criminal Appeals

which that court said he did not comply with; and 7) if petitioner's court-appointed counsel had fought harder, the revocation results would have been different.

Petitioner failed to raise the issues which are the subject of the first, second, fourth, and sixth objections before the magistrate judge. Issues not raised before the magistrate judge and raised for the first time in an objection to a Report and Recommendation will not be considered by this court and are deemed waived. *See United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001); *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *Dunkle v. Newton-Embry*, 328 Fed. Appx. 596, 597 (10th Cir. May 18, 2009); *Traylor v. Jenks*, 223 Fed. Appx. 789, 791 (10th Cir. Mar. 29, 2007); *Lewis v. Oklahoma ex rel. Board of Regents of Tulsa Community College*, 42 Fed. Appx. 160, 170 (10th Cir. June 18, 2002). The magistrate judge correctly construed the petition as filed under 28 U.S.C. § 2241 because it is challenging the revocation of petitioner's sentence, *see Stoltz v. Sanders*, 2000 WL 1730894 (10th Cir. Nov. 22, 2000) (No. 00-6188), but as a practical matter it makes no difference in the outcome. The revocation of petitioner's sentence occurred on June 12, 2003, and the sentence was imposed pursuant to the revocation on February 28, 2008. Thus, as the magistrate judge correctly explained, petitioner's suspended sentence had not expired at the time the state court entered its order revoking the suspended sentence, June 12, 2003, nor at the time the application to revoke was filed. Therefore, petitioner's sentence upon revocation was not illegal or invalid. Even if the assistant district attorney in fact perjured himself, that fact does not entitle petitioner to relief. Petitioner has not shown that he was prejudiced by the delay in sentencing him to which the alleged perjury related. With respect to petitioner's claim for ineffective assistance of counsel based upon his failure to "argue harder" for dismissal, the court fully concurs in the magistrate judge's analysis and conclusion with respect to this vague ground for relief.

In accordance with the foregoing, the Report and Recommendation of United States Judge Bana Roberts (doc. no. 29) is **ADOPTED** in its entirety. Petitioner's Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus By a Person in State Custody (doc. no. 1) is **DENIED**.

In light of the court's ruling, the Motion to Add Respondents to Case (doc. no. 11), the Motion for Judgment (doc. no. 13), the Motion to Compel (doc. no. 15), the Motion for Summary Judgment (doc. no. 20), and the motions for final disposition (doc. nos. 26, 27 and 28) are **DENIED**.

DATED June 11, 2010.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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